

10/18/2016 DRAFT CAFO sent to Whole Foods Market

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

-) EPA Docket No.

-) RCRA-HQ-2016-____

-) _____)

Whole Foods Market Group, Inc.,-) Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,-) Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc., _____) 42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,) _____
and Whole Foods Market Rocky Mountain/-) _____
Southwest, L.P., and _____)
Whole Foods Market Services, Inc., _____)

RESPONDENTS.)

CONSENT AGREEMENT AND FINAL ORDER

I. — PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency (“EPA”), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch’s Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware Corporation, and Whole Foods Market Rocky Mountain/Southwest, L.P., and Whole Foods Market Services, Inc. a Texas limited partnership (collectively the “Respondents” or “Whole Foods Market”), hereby agree to resolve this matter through the issuance of enter into this Consent Agreement and Final Order (“CAFO”) before taking testimony and without adjudication of any issues of fact or law herein.

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~~I. NATURE OF THE ACTION~~

~~2. This is a civil administrative action initiated under Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 (collectively "RCRA"), 42 U.S.C. § 6928(a)~~

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and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22 (2016). This action orders injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

3. The Consolidated Rules provide that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a CAFO. 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

4.2. Complainant and Respondents have, having conferred for the purposes of settlement pursuant to 40 C.F.R. § 22.18, and expressing a mutual desire to settle enter into a global agreement covering the Whole Foods Market stores identified in Appendix A of this action. Accordingly, before any testimony has been taken upon the pleadings and without any admission of violation or adjudication of any issue of fact or law, and in accordance with 40 C.F.R. § 22.13(b), Complainant and Respondents CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

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II. THE PARTIES

5. Gregory Sullivan, Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

6. Respondent Whole Foods Market Group, Inc. is a Delaware corporation that owns and operates Whole Foods Market Stores in the following regions of the United States: Northeast, North Atlantic, Mid-Atlantic, Florida, South, and Midwest. These stores are identified in Appendix A(I) of this CAFO.

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7. Respondent Whole Foods California, Inc. is a California corporation that owns and operates Whole Foods Market Stores in Northern California and Northern Nevada. These stores are identified in Appendix A(II) of this CAFO.

8. Respondent Mrs. Gooch's Food Markets, Inc. is a California corporation that owns and operates Whole Foods Market Stores in Southern California, Arizona, Southern Nevada, and Hawaii. These stores are identified in Appendix A(III) of this CAFO.

9. Respondent Whole Foods Market Pacific Northwest, Inc. is a Delaware corporation that owns and operates Whole Foods Market Stores in the Pacific Northwest. These stores are identified in Appendix A(IV) of this CAFO.

10. Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. is a Texas limited partnership that owns and operates Whole Foods Market Stores in the Southwest and Rocky Mountain regions of the United States. These stores are identified in Appendix A(V) of this CAFO.¹

11. Respondent Whole Foods Market Services, Inc. is a Delaware corporation that provides, *inter alia*, overall policy direction for, and legal, financial and administrative support to, all of the Whole Foods Market entities identified in Paragraphs 5 through 9 of this CAFO. Whole Foods Market Services, Inc. is entering into this CAFO for the limited purpose of guaranteeing the payment obligations of Whole Foods Market, providing financial assurance and other support for implementation of the requirements of this CAFO at all Whole Foods Market Stores.

III. PRELIMINARY STATEMENTS

¹ Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. owns and operates Whole Foods Market Stores located in Texas, Oklahoma, Arkansas, and New Mexico. Whole Food Company, Inc. owns and operates Whole Foods Market Stores in Louisiana. The stores located in these states are subject to CAFOs entered into by United States Environmental Protection, Region 6 and Whole Foods Market Rocky Mountain/Southwest, L.P. and Whole Food Company, Inc. See USEPA Docket Nos. RCRA-06-2016-0904 through 0908.

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12. The terms of this CAFO constitute a full and final settlement between the parties for all claims for civil penalties and injunctive relief pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) for the alleged violations of RCRA specified in Section VIII of this CAFO. Except as provided in paragraph _____, compliance with this CAFO shall not be a defense to any other action arising out of Whole Foods Market's future conduct and commenced pursuant to federal, state, and local environmental laws and it is the responsibility of Respondents to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondents.

13. Respondents agree to pay the civil penalties specified in Section X as full and final settlement for all civil claims specified in this CAFO. 40 C.F.R. § 22.18(b)(2).

3. Respondents agree to fully implement the For the purpose of these proceedings, Respondents admit the jurisdictional allegations herein; however, Respondents neither admit nor deny the factual and legal allegations contained in this CAFO.

14. II. Supplemental Environmental Project(s) set forth in Section XI of this CAFO.

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15. The Parties to this CAFO shall bear their own costs and attorneys' fees in the action resolved by this CAFO.

IV. JURISDICTION AND WAIVER OF RIGHT TO HEARING

16.4. This The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is entered into authorized pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments ("HSWA") of 1984 (collectively, "RCRA"), 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. Part §§ 22.13(b) and 22.18(b)(2) and (3).

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17. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of the EPA may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program, when the Administrator finds that the state program meets certain conditions. Any violation of regulations promulgated pursuant to Subtitle C of RCRA (sections 3001-3024 of RCRA, 42 U.S.C. §§ 6921-6939g) or of any state provision authorized pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), constitutes a violation of RCRA, subject to the assessment of civil penalties and issuance of compliance orders as provided by Section 3008 of RCRA, 42 U.S.C. § 6928.

18. Each of the Affected States and Territories described herein, with the exception of Iowa,² are authorized pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926, to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government's program. Not all the Affected States and Territories described herein, are authorized to administer the Universal Waste regulations at 40 C.F.R. Part 273.

19. The violations of RCRA described herein are alleged to have occurred in all Affected States and Territories and this compliance agreement covers Whole Foods Market's Stores in all Affected States and Territories, so citations to federal RCRA regulations are used for the parties' convenience. Respondents agree that the terms of this compliance agreement govern their actions but that States may impose requirements broader in scope than the federal regulations and this CAFO.

² The State of Alaska is the only other state not authorized to administer the base RCRA hazardous waste program. As of the effective date of this CAFO, there are no Whole Foods Market Stores located in Alaska. Thus, Alaska is not an Affected State.

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~~20. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) the Administrator may issue an order assessing a civil penalty for any past or current violation and require compliance immediately or within a specified time period.~~

~~21.5. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) Pursuant to RCRA Section 3006(b), 42 U.S.C. § 6926(b), and Section 3008(a) and (g), 42 U.S.C. § 6928(a) and (g), EPA may enforce federally-authorized approved state hazardous waste programs for violations of any requirement of Subtitle C of RCRA, as well as the federal regulations promulgated pursuant to HSWA.³~~

~~22. Section 3006 of RCRA, 42 U.S.C. § 6926, as amended, provides, *inter alia*, that authorized state hazardous waste programs are carried out under Subtitle C of RCRA. Therefore, a violation of any requirement of law under an authorized state hazardous waste program is a violation of a requirement of Subtitle C of RCRA.~~

~~23.6. Pursuant to RCRA Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.~~

~~24. For the purposes of this CAFO, Respondents admit the jurisdictional allegations set forth in this consent agreement; however, the Respondents neither admit nor deny the specific factual allegations and legal conclusions contained in this CAFO. 40 C.F.R. § 22.18(b)(2).~~

~~25. The Respondents waive any right they may have to contest the allegations in this CAFO, any right to appeal the proposed Final Order set forth herein, and Respondents do not waive all any claims or defenses which Respondents have been raised or could have been raised to the claims set forth in interpretation of the CAFO.~~

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³ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer their own hazardous waste program.

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~~26. The Respondents waive their right to challenge the validity of this CAFO and the settlement of the matters addressed in this CAFO based on any issue related to the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*~~

~~27. The Respondents waive any right they may have pursuant to 40 C.F.R. § 22.8 to be present during any discussions, with, or to be served with and reply to, any memorandum or communication addressed to EPA officials where the purpose of such discussion, memorandum or communication is to persuade such official to accept and issue this CAFO so long as the EPA officials provide the Respondents with notice and, if written, a copy of such memorandum or communication from any third party.~~

V. PARTIES BOUND

~~28. This CAFO applies to and is binding upon the Complainant and the Respondents. Successors and assigns of any of the Respondents are also bound if they are owned, in whole or part, directly or indirectly, by one or more of the Respondents. Nothing in the previous sentence shall adversely affect any right of EPA under applicable law to assert successor or assignee liability against a Respondents' successor or assignee, even if not owned in whole or in part, directly or indirectly, by one of the Respondents.~~

~~29.7. Each Party certifies that at least one of its undersigned representatives is fully authorized by the Party whom he or she represents to enter into the terms and conditions of the CAFO, to execute it on behalf of that Party, and to legally bind the Party on whose behalf he or she signs this CAFO.~~

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VIII. DEFINITIONS

~~30.8. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same~~

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meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.
- c. "Conditionally Exempt Small Quantity Generator" means a facility that generates ~~less than 100 kg of hazardous waste or less~~ in a calendar month.
- d. "Confidential Business Information" or "CBI" shall have the same definition as in 40 C.F.R. §§ 2.201-2.406.
- e. "Consent Agreement and Final Order" or "CAFO" shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. "Consumer Products" shall mean any merchandise sold by Respondents at Whole Foods Market Stores, ~~and which if being discarded~~, may have to be managed as RCRA hazardous waste.
- g. "Day" means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State ~~and/or~~ Territory holiday, the period shall run until the close of business of the next business day.
- h. "Effective Date" is defined in Section XVIII of this CAFO.

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- i. "EPA" means the United States Environmental Protection Agency.
- j. "Large Quantity Generator" means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- k. "Notify" and "Submit" and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a ~~business day~~ Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next ~~business day~~ Business Day.
- l. "Paragraph" shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- m. "Parties" shall mean Complainant and all Respondents.
- n. "RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
- ~~o. "Respondents" mean the entities described in Paragraphs 5 through 10 of this CAFO, or one or more such Respondent(s) as applicable.~~
- ~~p. q.~~ "Retail Associate" means a Whole Foods Market Store employee, including store leadership and team members.
- ~~q. r.~~ "Section" shall mean a portion of this CAFO identified by a roman numeral.
- ~~r. s.~~ "Small Quantity Generator" means a facility who generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.

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~~s. “Small Quantity Handler of Universal Waste” means a universal waste handler who does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or lamps, calculated collectively) at any time.~~

~~t.f. “Solid Waste” means any discarded material that is not excluded by under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31. For purposes of this CAFO, discarded material means all Consumer Products under Respondents’ control that cannot be sold at a Whole Foods Market Store or used by Whole Foods Market, and for which Respondents do not have a contractual agreement or general practice providing for the return of that material to the manufacturer (readily confirmed by a written agreement with the manufacturer or business records maintained by the Respondents documenting routine returns of the material to the manufacturer), or the material otherwise cannot be donated, resold, reused, or recycled in a manner that does not constitute discard pursuant to 40 C.F.R. § 261.2 or applicable state law, or which the donation, resale, reuse, or recycling is prohibited under other applicable federal or state law.~~

~~u.s. “Stores,” “Facilities,” or “Whole Foods Market Stores” mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including “365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).~~

~~v.i. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.~~

~~w. “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps.~~

~~x. “Universal Waste Handler” includes a generator of universal waste.~~

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~~VII. STATUTORY AND REGULATORY BACKGROUND~~

31. ~~In 1976, Congress enacted RCRA, amending the Solid Waste Disposal Act, to regulate hazardous waste management. RCRA Subtitle C, 42 U.S.C. §§ 6921 *et seq.*, empowers EPA to identify and list hazardous wastes. It also authorizes EPA to regulate hazardous waste generators, transporters, and the owners and operators of hazardous waste treatment, storage, and disposal facilities. EPA has promulgated regulations to implement RCRA Subtitle C, which are set forth at 40 C.F.R. Parts 260-279.~~

32. ~~Pursuant to Section 3001 of RCRA, 42 U.S.C. § 6921, EPA promulgated regulations to define what materials are “solid wastes,” and of these solid wastes, what wastes are regulated as “hazardous wastes.” These regulations and definitions are set forth at 40 C.F.R. Part 261.~~

33. ~~Pursuant to 40 C.F.R. § 261.2, a “solid waste” is any discarded material that is not otherwise excluded by regulation or variance.~~

34. ~~Regulations governing the identification of hazardous wastes are found in 40 C.F.R. Part 261. These regulations contain two (2) categories of hazardous wastes, “listed” and “characteristic.” Those wastes that have been determined to be hazardous by definition have been assigned certain identification numbers and are referred to as “listed wastes.” “Characteristic hazardous wastes” are solid wastes that exhibit one or more of the following characteristics: ignitability, reactivity, corrosivity or toxicity.~~

35. ~~Section 3002 of RCRA, 42 U.S.C. § 6922, requires EPA to establish standards applicable to generators of hazardous wastes. These standards are codified at 40 C.F.R. Part 262 and include requirements for determining whether a waste is hazardous, managing waste in proper containers, labeling and dating containers, inspecting waste storage areas, training,~~

planning for emergencies, and procedures and requirements related to shipping wastes off-site for treatment, storage, or disposal.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. PRELIMINARY IV. FACTUAL AND LEGAL ALLEGATIONS

36.9. Each Respondent is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

37.10. The Respondents, with the exception of Whole Foods Market Services, Inc., own and operate the Stores identified in Appendix A of this CAFO. The stores identified in Appendix A of this CAFO. These stores are considered "facilities" pursuant to within the meaning of 40 C.F.R. § 260.10.

38. The Respondents sell Consumer Products, some of which may be considered become "solid waste" when discarded, including hazardous waste under federal or state law. Most of these consumer products are sold to the public in the ordinary course of business, including, but not limited to, nail polish remover, alcohol/liquor, drain cleaners, and vitamins/supplements.

11. If these Consumer Products they are returned, expired, spilled/spill or leaking or are in a condition such that they cannot be used for their intended purpose, sold, or recycled, some of these consumer products.

39. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law due to:

a. Characteristic by having the characteristic of ignitability (D001) and, corrosivity (D002); and

b.12. Characteristic of, or toxicity (D007, D010, D009, and D011).

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40.13. Collectively the Respondents own and operate~~Most, if not all,~~ Whole Foods Market Stores in the Affected States and Territories, generate 100 kilograms ("kg") of which, on a monthly basis, a very large majority may be hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators ("CESQG") ~~of hazardous waste, CESQGs~~) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part 262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

41. Between August 2014 and August 2015, EPA Region 6 ~~investigated~~ conducted an investigation of Respondent Whole Foods Market Rocky Mountain/Southwest, L.P.'s stores ~~Stores~~ located in Texas, Oklahoma, New Mexico and Arkansas and found that these stores contained customer returns and expired products that are hazardous waste due to the characteristics identified in paragraph 37 of this CAFO.

42. The investigation described in paragraph 39 of this CAFO revealed that Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. failed to make sufficient hazardous waste determination of its solid waste streams as required by 40 C.F.R. § 262.11(c).

43. The investigation described in paragraph 39 of this CAFO also revealed that Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. is a small quantity handler of universal waste that failed to comply with one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16.

44.14. As a result of the noncompliance described in paragraphs 41 and 42, ~~investigation,~~ EPA Region 6 and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into four (4) CAFOs with Region 6, each CAFO covering the individual states in which Whole

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~~Foods Market Rocky Mountain/Southwest, L.P., stores were located, consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").~~

~~45.15. In September 2016, the Respondents approached EPA to voluntarily disclose similar violations of RCRA at Whole Foods Market Stores located in~~ Although EPA has not conducted its own investigation of Stores located outside Texas, Oklahoma, New Mexico and Arkansas, Respondents and EPA have mutually agreed to enter into a similar agreement for stores located in all states and territories other than those covered by the CAFOs with Region 6. Respondents also expressed their desire to establish comprehensive measures to remedy such violations through implementation of an enhanced hazardous waste management program that includes an advanced electronic system for the continuous management of returned, expired, spilled, or leaking Consumer Products required to be handled as hazardous waste at Whole Foods Market Stores nationwide. EPA and Respondents thereafter ~~Region 6 CAFOs. EPA and Respondents have~~ engaged in expedited discussions to reach the agreement contained herein ~~for,~~ which includes implementation of an enhanced hazardous waste management system in all of its stores ~~Respondents' Stores.~~ This enhanced hazardous waste management system is designed to provide ~~for~~ ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many respects goes beyond mere ~~the~~ minimum requirements necessary for compliance with environmental ~~the~~ applicable federal and state hazardous waste laws ~~and regulations.~~ This program is more fully described in Paragraphs _____ of this CAFO and appendices ____.

46. ~~The majority of the Respondents' Whole Foods Market Stores covered by this CAFO typically generate less than 100 kg of hazardous waste per month, and therefore, are subject only to the RCRA regulatory requirements applicable to CESQGs at 40 C.F.R. § 261.5. However, prior to _____, Respondents did not systematically determine if Solid Wastes were hazardous waste as required by 40 C.F.R. § 262.11 at these stores.~~

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~~47.16. Under the Respondents' enhanced hazardous waste management program required by this CAFO, hazardous waste determinations will be made at all Whole Foods Market Stores and hazardous wastes will be picked up by licensed hazardous waste haulers and transported under a RCRA hazardous waste manifest to a hazardous waste treatment, storage, or disposal facility. Respondents have already taken steps to implement their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.~~

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~~48. Respondents currently operate all Whole Foods Market Stores generally in compliance with the Small Quantity Generator ("SQG") requirements of 40 C.F.R. Part 262, even if the facility does not generate more than 100 kg of hazardous waste per month.~~

B. VIOLATIONS

Count 1: Failure to Make a Hazardous Waste Determinations

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~~49. Paragraphs 1 through 46 above are incorporated herein by reference as if they were set forth in their entirety.~~

~~50.17. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is a hazardous waste.~~

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~~51. Solid waste is generated at Whole Foods Market Stores. From _____ until _____, Based upon the terms of the Region 6 CAFO, and without independent investigation, or any admission of liability or guilt by Respondents, before shipping Solid Wastes, failed to EPA has concluded that Respondents did not systematically or routinely make hazardous waste determinations at their all Whole Foods Market Stores.~~

~~52.18. By failing to determine whether the Solid Waste generated at Whole Foods Market Stores was a hazardous waste, Respondents violated as required by 40 C.F.R. § 262.11.~~

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Count 2: Failure to Comply with the Universal Waste Requirements

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53. Paragraphs 1 through 46 above are incorporated herein by reference as if they were set forth in their entirety.

54. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with 40 C.F.R. § 273.13 through 273.16.

55. From _____ until _____, Respondents failed to systematically or routinely comply with the requirements set forth in 40 C.F.R. § 273.13 through 273.16.

56. By failing to comply with the universal waste requirements at Whole Foods Market Stores, Respondents violated 40 C.F.R. § 273.13 through 273.16.

IX. COMPLIANCE AGREEMENT

19. EPA did not identify any spills, leaks or releases at or from Respondents' facilities.

V. TERMS OF SETTLEMENT

20. Based on the foregoing Preliminary Statements, Findings of Fact and Conclusions of Law, the Parties agree to the following entry of this CAFO on the terms set forth herein.

Compliance Provisions

21. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month (, pursuant to 40 C.F.R. § 261.5), the enhanced hazardous waste management program implemented by each Respondent Respondents at Whole Foods Market Stores, as referenced in Paragraphs 59 through 63 of this CAFO, generally seeks to satisfy RCRA SQG requirements the hazardous waste generator requirements applicable to Small Quantity Generators ("SQGs") and, therefore, goes above and beyond the minimum requirements applicable under the law.

22. Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

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- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts.
- c. Respondents will hire a third-party consultant to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations. The third-party consultant, after identifying the potentially hazardous items, will load the information into Respondents' electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste streams.

~~57. To the extent consumer products continue to be subject Consumer Products become hazardous waste, Respondents have implemented, and will continue to RCRA-hazardous waste requirements when discarded, Whole Foods Market agrees implement a system to:~~

- ~~a. As applicable (e.g., SQG or Large Quantity Generator), each Respondent shall ensure that all Whole Foods Market Stores have an EPA identification number, pursuant to 40 C.F.R. § 262.12.~~
- ~~b. At all Whole Foods Market Stores, the Respondents must properly segregate/accumulate and store all hazardous wastes for no more than 180 days (270 days if the waste must be shipped more than 200 miles to a treatment,~~

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storage, or disposal facility) and comply with all other requirements applicable to SQGs at 40 C.F.R. § 262.34.

c. Each Respondent must properly package, label, mark, and placard all hazardous waste shipments from Whole Foods Market Stores pursuant to 40 C.F.R. §§ 262.30—262.33.

d. Each Respondent must comply with all manifest and related requirements for hazardous wastes shipped from Whole Foods Market Stores pursuant to 40 C.F.R. §§ 262.20—262.27.

e. Each Respondent must use transporters that have an EPA identification number to transport hazardous wastes from Whole Foods Market Stores.

f. Each Respondent must send all hazardous wastes generated at Whole Foods Market Stores to treatment, storage, or disposal facilities that have an EPA identification number.

g. Each Respondent must maintain required records and submit required reports pursuant to 40 C.F.R. §§ 262.40—262.44.

58. If at any time a Whole Foods Market Store generates 1000 kg or more of hazardous waste in a calendar month or accumulates more than 6000 kg of hazardous waste on-site, the relevant Respondent must comply with all Large Quantity Generator requirements in 40 C.F.R. Part 262 with respect to that Whole Foods Market Store.

59. Each Respondent must comply with the standards for Small Quantity Handlers of Universal Waste set forth in 40 C.F.R. §§ 273.10—273.20 at all Whole Foods Stores.

60. Each Respondent must submit to EPA within sixty (60) days of the filing of this CAFO (commonly referred to as the “bucket” or “tote” system) until it is picked up by a current list of all Consumer Products that each Respondent currently manages as hazardous waste at

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~~their Whole Foods Market Store if those products are returned, expired, spilled, leaking, and cannot be used for their intended purpose in Whole Foods Market Stores (“RCRA Hazardous Item List”). This list will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.~~

~~61. Annual implementation progress reporting [TBD]~~

~~d. Each Respondent must make licensed hazardous waste determinations for all Solid Wastes, pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement and for purposes of hauler for proper off-site transport and disposal.~~

~~62. In order to assist its Stores in implementing this CAFO only, the Respondents shall:~~

~~a. Implement regional hazardous waste determination guidance charts, as well as State-specific charts (if necessary) to continuously monitor the management of hazardous waste at Whole Foods Market Stores. These “Regional Hazardous Waste Determination Charts” and “State-specific Charts” are described and set forth in Appendix B of this CAFO; and~~

~~b. Maintain a current database of all Consumer Products—at each Store—that are required to be managed as hazardous waste pursuant to this agreement. This current database must be made available to any EPA or State official conducting a RCRA compliance inspection at that Store. This database shall be the same or similar as the advanced electronic system handheld terminal type system (or equivalent) described in Paragraph 62 of this CAFO and Appendix C.~~

~~63. As of the date of filing of this CAFO, Whole Foods Market has already taken steps to improve its environmental compliance program to address the allegations in this CAFO and to ensure compliance with all applicable environmental laws related to Whole Foods~~

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Market's enhanced hazardous waste management. Generally, these steps include an improved or enhanced hazardous waste management system at Whole Foods Market Stores, including, but not limited to, development of hazardous waste management training programs for Whole Foods Market Retail Associates, development of various **Ex. 4 CBI** standardized operating procedures, and development and implementation of the Electronic Hazardous Waste Identification System. Specifically, Whole Foods Market agrees to the following programs that have either been implemented or will be implemented in response to the allegations of the United States:

a. Implementation of Electronic Hazardous Waste Identification System at Stores.

Whole Foods Market has **Ex. 4 CBI** review the Consumer Products to be sold at their Stores and determine if those products, if discarded by Whole Foods Market, would be considered hazardous waste pursuant to RCRA ("RCRA Items"). Once the RCRA Items are identified, either **Ex. 4 CBI** **Ex. 4 CBI** that information is then loaded into the Stores' handheld terminal (or equivalent) and the RCRA Items are identified as being potentially flammable, toxic/corrosive, reactive, or listed pursuant to RCRA, in the Stores' handheld terminal (or equivalent) and on the product's shelf label (each category designated by color). To the extent these RCRA Items become a waste (as the result of expiration, customer returns, spills or damage at the Store), Whole Foods Market has implemented **Ex. 4 CBI**

Ex. 4 CBI

[PAGE]

Ex. 4 CBI

Ex. 4 CBI to ensure proper management of RCRA Items once they become solid waste during the term of this CAFO and thereafter, to the extent the law continues to identify these items as subject to the hazardous waste requirements of RCRA. The Electronic Hazardous Waste Identification System,

Ex. 4 CBI are further described in Attachment C of this CAFO.

- b. Development and Implementation of Mandatory Hazardous Waste Training at Stores for Retail Associates. Whole Foods Market has developed and implemented **Ex. 4 CBI**

Ex. 4 CBI

training. Whole Foods Market's Hazardous Waste Management Trainings are further described in Attachment D of this CAFO.

- c. Development of **Ex. 4 CBI** Standard Operating Procedures Relating to Hazardous Waste Management. In order to assist its Stores in the management of various types of hazardous and universal waste, Whole Foods Market has developed and implemented **Ex. 4 CBI** Respondents will develop and

implement standard operating procedures ("SOPs") for use by Retail Associates.

These standard operating procedures are available and accessible to Retail

Associates through Whole Foods Market's intranet system. These procedures are

further described in Attachment E of this CAFO.

64.c. Whole Foods Market shall implement the programs identified in Paragraphs

61 and 62 and the relevant appendices of this CAFO in all of its Stores located in

the United States and its territories. This will advance compliance with

environmental regulatory requirements, including Whole Foods Market's

management of hazardous materials and hazardous waste and reduction of waste

generated from its Stores.

65.f. Third Party Audit [To Be Discussed]

The

66.23. Respondents must certify compliance to EPA with the appropriate documentation

to shall certify that they are complying with the requirements set forth in Paragraphs ____ above,

within ninety (90) days of the schedule provided for completion in Appendix _____. The

certification and supporting documentation should be provided to:

Greg Sullivan, Acting Division Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (2249A)
Washington, DC 20460

67. Respondents shall be liable for stipulated penalties to the EPA, as specified

below, for failure to comply with the requirements of this CAFO, unless excused by EPA in its

sole discretion. Compliance by Respondents shall include the timely completion and submittal

of the RCRA Hazardous Item List, any reports, or other submissions required by this agreement

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or any subsequent modification. Respondents must pay stipulated penalties in the following amounts for the following obligations in the amounts set forth below:

- a. for failure to timely submit reports, plans, notifications, or other submittals required in this CAFO or its Appendices; or
- b. for failure to timely meet any deadlines set forth in the CAFO;

Period of Failure to Comply	Penalty Per Violation Per Day
1st through 7th day	\$100.00
8th through 21st day	\$250.00
22nd through 30th day	\$500.00
Greater than 30 days	\$1,000

68. Respondents' failure to timely comply with any requirement of this CAFO may subject Respondent to a civil action pursuant to Section 3008(c) of RCRA, 42 U.S.C. § 6928(c), to collect penalties for noncompliance with this CAFO.

69. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

70. Nothing in this CAFO relieves Respondents from their obligation to comply with all applicable federal, state, and local statutes and regulations, including Subtitle C requirements at 40 C.F.R. Parts 260 through 279, and authorized state programs, at all Stores.

71-24. Nothing in this CAFO will require Respondents to meet more stringent requirements contained in this CAFO in the event that the applicable law becomes less stringent. Within sixty (60) days of Whole Foods Market providing written notice to EPA that applicable requirements have been modified by issuance of any new EPA final regulation (as promulgated in the Federal Register); policy or guidance governing hazardous waste management; upon EPA

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approval or promulgation of new or revised waste management standards; or upon the issuance of a permit that contains new requirements pertaining to Whole Foods Market's operations, Whole Foods Market may conform its practices to the less stringent obligations contained in the applicable new regulation, policy, new or revised standard or permit.

~~X. PAYMENT OF CIVIL PENALTY~~

Civil Penalty

72. Respondents agree to pay a civil penalty in the sum of \$ _____ within thirty (30) days of the effective date of this CAFO to resolve the RCRA violations alleged herein.

73. The parties agree that the payment of the civil penalty specified in Paragraph 69 resolves the civil penalty liability for the violations alleged herein.

74.25. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

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For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

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The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al.,

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Docket No. RCRA-HQ-2016-____) must be clearly documented on or within Respondents' chosen method of payment to ensure proper credit.

75-26. Respondents shall submit a copy of the payment to the following addresses:

..... U.S. Environmental Protection Agency
..... Clerk of the Board
..... Environmental Appeals Board
..... Ariel Rios Building
..... 1200 Pennsylvania Avenue, N.W.
..... Washington, D.C. 20460-0001

..... Laura Welles, Attorney-Advisor
..... Waste and Chemical Enforcement Division
..... Office of Civil Enforcement
..... U.S. Environmental Protection Agency
..... 1200 Pennsylvania Avenue, N.W. (MC 2249A)
..... Washington, D.C. 20460

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76-27. Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

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77-28. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the

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CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).
- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

~~Supplemental Environmental Project XI. SUPPLEMENTAL ENVIRONMENTAL
PROJECT(S)~~

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~~XII. RESERVATION OF RIGHTS AND RELEASE~~

29. [Terms TBD]

VI. OTHER MATTERS

Effect of Settlement/Reservation of Rights

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30. The terms of this CAFO constitute a full and final settlement between the Parties for all claims that have been brought or could have been brought against Respondents related to the subject matter of this CAFO, and shall bar any further actions against Respondents for acts related to the subject matter of this CAFO which allegedly occurred prior to the date of entry of this CAFO.

31. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

~~78-32. Notwithstanding any other provision of this CAFO, an enforcement action may nothing in this CAFO shall be brought pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, or other applicable statutory construed to limit the authority of the EPA to take any action against Respondent to address conditions that may present an imminent and substantial endangerment to human health or the environment.~~

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~~79. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.~~

~~80. Except as expressly provided herein, nothing in this CAFO shall constitute or be construed as a release from any civil or criminal claim, cause of action or demand in law or equity for any liability Respondents may have arising out of, or relating in any way to, the storage, transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from the Respondents' stores.~~

~~81. EPA's agreement not to sue or take administrative action against Whole Foods Market as described in paragraph ____ is conditional upon the accuracy of Respondents'~~

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representations to EPA related to the Findings of Fact and Conclusions of Law set forth in Section VIII of this CAFO.

~~82.~~33. Unless specifically allowed under the terms of this CAFO, this CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

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Costs

34. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

~~83.~~35. [terms of agreement not to sue/take action - TBD]

XIII. DISPUTE RESOLUTION

~~84.~~ The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this CAFO.

~~85.~~ If Respondents disagree, in whole or in part, with any decision by EPA under this CAFO, Respondents shall notify EPA through the Chief of the Waste Enforcement Branch, and the Parties must use their best efforts to informally and in good faith resolve all disputes or differences of opinion relating to this CAFO.

~~86.~~ In the event that the parties cannot resolve a dispute by informal negotiations under the preceding paragraph, Respondents may pursue the matter by submitting its objection to the Chief of the Waste Enforcement Branch of EPA in writing. Respondents' written objections must set forth the specific points of the dispute, the basis for Respondents' position and any matters which it considers necessary for EPA's determination.

~~87.~~ Complainant and Respondents shall have thirty (30) days from receipt of Respondents' written objections to attempt to resolve the dispute through formal discussions.

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88. Within sixty (60) days of EPA's receipt of Respondents' written objections, EPA, through the Chief of the Waste Enforcement Branch of EPA, will provide to Respondents in writing EPA's decision on the pending dispute.

89. If Respondents disagree with the written decision, the Respondents may, within thirty (30) days of receipt of the written decision, appeal to the Director, Waste and Chemical Enforcement Division. Respondents' appeal must set forth the specific points of the dispute, the basis for Respondents' position and any matters which it considers necessary for EPA's determination. Within thirty (30) days of receipt of the appeal, the Director, Waste and Chemical Enforcement Division will issue a written decision.

90. If Respondents disagree with the written decision of the Director, Waste and Chemical Enforcement Division, within sixty (60) days of receipt of the Director's decision, Respondents may file an appeal of that decision with the Environmental Appeals Board ("EAB").

91. The Parties may, by mutual written agreement, extend any of the time periods provided for in the dispute resolution process.

XIV. FORCE MAJEURE

92. A "Force Majeure event" is any event beyond the control of Whole Foods Market, its contractors, or any entity controlled by Whole Foods Market that delays the performance of any obligation under this CAFO despite Whole Foods Market's reasonable efforts to fulfill the obligation. "Reasonable efforts" includes anticipating any potential Force Majeure event and addressing the effects of any such event: (1) as it is occurring, and (2) after it has occurred, such that the delay is minimized to the greatest extent reasonably possible.

93. Whole Foods Market agrees to notify the United States by written notice as soon as possible, but not later than 72 hours after the time Whole Foods Market first knew of any

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event which might constitute a Force Majeure event. The written notice Whole Foods Market submits pursuant to this Paragraph will indicate whether Whole Foods Market claims that the delay should be excused due to a Force Majeure event. The notice will describe the basis for Whole Foods Market's contention that it experienced a Force Majeure delay, the anticipated length of the delay, the cause or causes of the delay, the measures taken or to be taken to prevent or minimize the delay, and the timetable by which those measures will be implemented. Whole Foods Market agrees to adopt all reasonable measures to avoid or minimize such delay.

94. If the United States finds that a delay in performance is, or was, caused by a Force Majeure event, the United States agrees to extend the time for performance, in writing, for a period to compensate for the delay resulting from such event, and stipulated penalties will not be due for such a period. In proceedings on any dispute regarding a delay in performance, Whole Foods Market will have the burden of proving, by a preponderance of the evidence, that the delay is, or was, caused by a Force Majeure event and that the amount of additional time requested is necessary to compensate for that event.

95. An extension of one compliance date based on a particular event will not automatically extend any other compliance date. Whole Foods Market will make an individual showing of proof regarding the cause of each delayed incremental step or other requirement for which an extension is sought.

XV. OTHER APPLICABLE LAWS

96. All actions required to be taken pursuant to this CAFO shall be undertaken in accordance with the requirements of all applicable local, state, and Federal laws and regulations. Respondents must obtain or cause its representatives to obtain all permits and approvals necessary under such laws and regulations.

XVI. NOTIFICATION

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Notification

97-36. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

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.....Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
-Office of Civil Enforcement
.....U.S. Environmental Protection Agency
.....1200 Pennsylvania Avenue, N.W. (MC 2249A)
.....Washington, D.C. 20460

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Respondents:

TBD

XVII. SEVERABILITY

98. It is the intent of the parties that the provisions of this CAFO are severable. If any provision or authority of this CAFO or the application of this CAFO to any party or circumstances is held by any judicial or administrative authority to be invalid or unenforceable, the application of such provisions to other parties or circumstances and the remainder of the CAFO shall remain in force and shall not be affected thereby.

XVIII. TERMINATION

Whole Foods Market Central Office
Attn: John H. Hemphling II
550 Bowie Street
Austin, TX 78703

Termination and Satisfaction

~~99.37.~~ At such time as the Respondents believe it has completed all of the requirements of this CAFO, they may request that EPA concur whether all of the requirements of this CAFO have been satisfied. ~~Such request must be~~ Respondents shall so certify in writing and shall provide the necessary documentation to establish whether there has been full compliance ~~in accordance with the terms and conditions of this CAFO. EPA will respond to said request~~ certification language set forth in Paragraph _____. Unless EPA objects in writing within ninety ~~(90)~~ sixty (60) days of receipt of the request. ~~This~~ Respondents' certification, then this CAFO shall terminate when all actions required to be taken by this CAFO have been completed, and the Respondents have been notified by the EPA in writing that this CAFO has been satisfied and terminated ~~on the basis of Respondents' certification.~~

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XIX. EFFECTIVE DATE

Effective Date

~~400.38.~~ This CAFO is effective upon the filing of the Final Order. 40 C.F.R. §
22.31(b).

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AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Greg Sullivan, Acting Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

(Counsel for Complainant)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

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FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET SERVICES, INC.:

Date: _____

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